Supreme Court, U. S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HOGAN & HARTSON and MERLE THORPE, JR.,

Petitioners,

—against—

INTERNATIONAL CONTROLS CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

QUESTION PRESENTED

Is an order denying a motion to disqualify counsel a final decision in a collateral matter so as to qualify for appeal pursuant to 28 U.S.C. § 1291 under the "collateral order" doctrine as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)?[1]

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1 The issue of the Court of Appeals' jurisdiction over an appeal from a denial of a disqualification motion is now before this Court on a grant of certiorari in the case of *In re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377 (8th Cir.), *cert. granted* sub nom. *The Firestone Tire & Rubber Company v. Risjord*, 100 S.Ct. 2150 (1980). There is also presently pending before this Court a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the identical question. *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980), (*en banc*) *petition for cert. filed*, 49 U.S.L.W. 3190 (U.S. Sept. 30, 1980).

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Hogan & Hartson and Merle Thorpe, Jr., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on July 30, 1980.

OPINIONS BELOW

The Memorandum Decision of United States District Judge Robert J. Ward (Southern District of New York) on the motion of Hogan & Hartson and Merle Thorpe, Jr., to disqualify the law firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov is unreported and appears at Appendix B.[2] The order and judgment of the panel of Judges William H. Timbers, Ellsworth A. Van Graafeiland and Jon O. Newman of the United States Court of Appeals for the Second Circuit is unreported and appears at Appendix A. The Court of Appeals issued no opinion.

JURISDICTION

The order of the Court of Appeals is dated and judgment was entered on July 30, 1980 (App. A, p. 1). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

United States Code, Title 28 § 1291.

"Final decisions of the district courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District

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2 References to the appendices to this Petition will be designated as "App. _____." References to the Joint Appendix in the Second Circuit Court of Appeals, submitted herewith are designated "_____ a."

Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

Petitioners moved on June 2, 1978 to disqualify David M. Butowsky, Esq. and the law firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov ("Gordon Hurwitz") as counsel for respondent in an action alleging violations of the federal securities laws and malpractice. (110a) The jurisdiction of the District Court is allegedly invoked under § 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa and under 28 U.S.C. § 1332(a). Neither of the defendants is a citizen of the state in which plaintiff resides.

On March 16, 1973, International Controls Corporation ("ICC") consented to the entry of a final judgment in a then pending suit brought by the Securities Exchange Commission ("SEC")[3] permanently enjoining it from future violations of the Securities Exchange Act. (128a) Pursuant to the consent decree the Court appointed a Special Counsel for ICC who was directed to (i) conduct an investigation into the affairs of ICC and prepare an official report to the Court, the SEC and the public of his findings and recommendations for action; and (ii) cause the institution and prosecution of litigation by ICC without the consent of ICC, subject only to the supervision of the SEC and approval by the District Court. (131-133a) By order dated March 23, 1973, David M. Butowsky, Esq. was appointed to the position of Special Counsel. (270a)

On November 29, 1977 Special Counsel filed an official purportedly objective report finding that ICC had claims

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3 *SEC v. Vesco, et al.*, 72 Civ. 5001 (CES). The complaint charged ICC and 41 additional defendants, not including petitioners, with a scheme to violate, among other things, Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5.

against petitioners. (115a) On that same day Special Counsel caused ICC to institute suit against petitioners in the United States District Court for the Southern District of New York, *ICC v. Hogan & Hartson,* 77 Civ. 5764 (RJW),[4] and named himself and his law firm as litigation counsel to prosecute the claims he had concluded ICC had against petitioners. Mr. Butowsky's law firm, Gordon, Hurwitz, appeared as attorneys for ICC in that action despite the fact that Mr. Butowsky, as Special Counsel was in control of the litigation.

On June 2, 1978, petitioners, renewing a motion originally filed on March 6, 1978 (37a), moved to disqualify Mr. Butowsky and his law firm from acting as litigation counsel for respondent in this case. Petitioners contended that Mr. Butowsky's retention of himself and his law firm as litigation counsel for ICC to prosecute an action based on claims which he, in his sole discretion and in his official capacity as Special Counsel, concluded existed warranted disqualification on two independent grounds:

1) An attorney cannot accept employment on a matter related to a subject matter for which he had direct and substantial responsibility in an official capacity because his expectation of personal profit creates an actual and apparent conflict of interest; and

2) A court-appointed official cannot personally profit from decisions he made and actions he took in his official capacity, as Butowsky is here doing in his capacity as litigation counsel in a case brought by him as Special Counsel.

The District Court, on August 21, 1979, denied petitioners' motion although it stated in its opinion that "a certain

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4 Special Counsel also instituted suit in ICC's name against petitioners in the Superior Court of New Jersey, Law Division—Essex County (subsequently transferred to the United States District Court for the District of New Jersey) and in the Superior Court of the District of Columbia, Civil Division (CA. 11848-77).

appearance of impropriety may surround the case" and "it would have been preferable for another law firm to represent ICC." (App. B, p. 15).

On September 12, 1979 petitioners requested a hearing before the District Court to consider the impact of the Second Circuit's panel opinion in *Armstrong v. McAlpin,* 606 F.2d 28 (2d Cir. 1979) decided on September 12, 1979 which disqualified Gordon Hurwitz in another action.[5]

At a hearing on September 18, 1979 petitioners requested the District Court to vacate its opinion on the basis of *Armstrong.* The District Court declined to vacate its opinion but urged petitioners to seek an expedited appeal and noted that it would be inclined to grant 1292(b) certification in the absence of such an expedited appeal. The Court further observed that it had a "difficult time" in reaching its decision, that it felt that the case was "not clear from doubt," that it was "troubled by this case" and "that the best way to resolve this case was in the Court of Appeals."

Consequently on September 26, 1979 petitioners filed their notice of appeal to the United States Court of Appeals for the Second Circuit and the appeal was expedited and argued on November 28, 1979. Both sides assumed appellate jurisdiction existed under *Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp.,* 496 F.2d 800 (2d Cir. 1974) (*en banc*) and the issue was neither raised nor briefed by the parties.

Thereafter, on December 12, 1979, the Court of Appeals granted a petition for rehearing *en banc* of its decision in *Armstrong v. McAlpin, supra* and directed the parties in *Armstrong* to brief the issue of the appealability of orders denying motions to disqualify counsel.

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5 The panel decision in *Armstrong* was subsequently reversed by the Court of Appeals sitting *en banc. Armstrong v. McAlpin,* 625 F.2d 433 (2d Cir. 1980). McAlpin petitioned this Court for a writ of certiorari on September 18, 1980. *See* 49 U.S.L.W. 3190 (September 30, 1980).

On June 20, 1980 the Second Circuit sitting *en banc* overruled its previous *en banc* determination in *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., supra* and held that "henceforth" it had no jurisdiction over District Court orders denying disqualification motions. *Armstrong v. McAlpin,* 625 F.2d 433, 435 (2d Cir. 1980) (*en banc*).[6]

On July 30, 1980 a panel for the Court of Appeals issued an order dismissing the appeal in the instant case "for lack of appellate jurisdiction: See *Armstrong v. McAlpin* * * * " (App. B, p.1) and intimated no opinion on the merits of this action. It is for review of this important jurisdictional question which we now seek certiorari.

REASONS FOR GRANTING THE WRIT

Certiorari Is Required to Resolve a Conflict Among the Circuits as to the Appealability of an Order Denying Disqualification of Counsel

There is a square and irreconcilable conflict among the federal circuit Courts of Appeals as to the appealability of an order denying disqualification of counsel.

Five of the circuit courts which have addressed the question have concluded that an order denying a motion to disqualify counsel is appealable under 28 U.S.C. § 1291 under the "collateral order" doctrine espoused in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). *Greene v. Singer Co.,* 509 F.2d 750 (3d Cir. 1971); *Aetna Casualty and Surety Co. v. United States,* 570 F.2d 1197 (4th Cir.), *cert. denied,* 439 U.S. 821 (1978); *Brown & Williamson Tobacco Corp. v. Daniel International Corp.,* 563 F.2d 671 (5th Cir. 1977); *Fullmer v. Harper,* 517 F.2d 20 (10th Cir. 1975); *Westing-*

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6 On August 26, 1980, two months after the *en banc* decision in *Armstrong,* a panel of the Circuit Court in *Cheng v. GAF Corporation,* Dkt. No. 80-7274 (2d Cir., August 26, 1980) took jurisdiction of an appeal from an order denying disqualification and, reversing the District Court, disqualified the plaintiff's attorney.

house Electric Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1313 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978).

On the other hand an equal number of circuits have determined just the reverse and held that an order denying disqualification is not so appealable. *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022 (D.C. Cir. 1976); *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *In re Multi-Piece Rim Products Liability Litigation*, 612 F.2d 377 (8th Cir.), *cert. granted*, sub nom. *The Firestone Tire & Rubber Company v. Risjord*, 100 S. Ct. 2150 (1980); *Cord v. Smith*, 338 F.2d 516 (9th Cir. 1964), *clarified*, 370 F.2d 418 (9th Cir. 1966); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980) (*en banc*).

The significance of this question and the necessity of resolving this obvious conflict is clearly evidenced by this Court's grant of certiorari in the *Firestone Tire* case. Moreover, the recurrent nature of this issue and the practical importance to the legal profession is highlighted by the petition for certiorari recently filed in the *Armstrong* case.

We respectfully request that the Court decide the instant case along with its decision in *Firestone Tire*. Failure to hear this appeal would preclude appellate determination of the significant substantive issues involved in this case which the District Court itself observed were difficult and warranted an immediate appeal.

CONCLUSION

Certiorari should be granted to resolve the significant division among the federal Courts of Appeals as to the important question of the appealability of orders denying motions to disqualify counsel.

Respectfully submitted,

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Of Counsel:
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Dated: October 10, 1980

APPENDIX

APPENDIX A

Order and Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of July one thousand nine hundred and eighty.

Present:

HON. WILLIAM H. TIMBERS, *Circuit Judge*
HON. ELLSWORTH A. VAN GRAAFEILAND, *Circuit Judge*
HON. JON O. NEWMAN, *Circuit Judge*

79-7659

INTERNATIONAL CONTROLS CORPORATION,

Plaintiff-Appellee,

—v.—

HOGAN & HARTSON and MERLE THORPE, JR.,

Defendants-Appellants.

ORDER

Appeal dismissed for lack of appellate jurisdiction. *See Armstrong v. McAlpin,* No. 745, slip op. at 3708 & n.13 (2d Cir. June 20, 1980).

HON. WILLIAM H. TIMBERS

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. JON O. NEWMAN

July 30, 1980

APPENDIX B

Decision of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

77 Civ. 5764 (RJW)

INTERNATIONAL CONTROLS CORP.,

Plaintiff,

—against—

HOGAN & HARTSON and MERLE THORPE, JR.,

Defendants.

Defendants Hogan & Hartson and Merle Thorpe, Jr. ("Thorpe") move to disqualify the law firm of Gordon Hurwitz Butowsky Baker Weitzen & Shalov ("Gordon Hurwitz"), counsel for plaintiff International Controls Corporation ("ICC") in this action. For the reasons hereinafter stated, the motion is denied.[1]

FACTUAL BACKGROUND

In November 1972, the SEC brought an action seeking to enjoin Robert L. Vesco, ICC and forty other individuals and entities from further violations of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5, and § 13 of that Act, 15 U.S.C. § 78m. The complaint alleged in essence

1 The Securities and Exchange Commission ("SEC") has moved for leave to participate *amicus curiae* and to file a memorandum in opposition to defendants' motion for disqualification. The SEC's motion is granted.

that the defendants had been involved in a complex scheme of corporate looting and theft. On March 16, 1973, Judge Charles E. Stewart of this Court entered a consent judgment against ICC in that action. In addition to permanently enjoining ICC from further violations of the securities laws, the judgment provided *inter alia* for the appointment by the Court of a Special Counsel[2] and a new interim Board of Directors for ICC satisfactory to the SEC. By order dated March 23, 1973, Judge Stewart appointed David M. Butowsky ("Butowsky") to the position of Special Counsel.

Pursuant to the consent decree, Special Counsel was charged with certain duties, including the responsibility to:

> (a) conduct a full investigation and arrange for and oversee an accounting into the financial and other affairs of International Controls, and report to this Court and plaintiff Commission his findings and recommendations for action. . . .
>
> (b) take all appropriate action, including but not limited to, the institution and prosecution of suits on behalf of International Controls to recover all assets or monies improperly used, taken, wasted, misappropriated, dispensed, obligated or paid to anyone (i) without appropriate authorization, approval or ratification of the

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2 The final judgment provided in pertinent part:

> (3) ORDERED that this Court shall appoint a Special Counsel satisfactory to plaintiff Commission. The Special Counsel (i) shall be paid such compensation and be reimbursed for such expenses (including counsel fees) by International Controls as shall be allowed by this Court; (ii) shall not be liable for any action taken or omitted to be taken by him or for any error in judgment made in good faith by him in his capacity as Special Counsel unless it shall be proved that he was grossly negligent in connection with such action, omission or judgment; (iii) shall have the right to consult this Court and to apply to this Court for advice or direction; and (iv) shall have the right to resign and be discharged of his obligations as Special Counsel upon notice to this Court, in which event, a successor shall be appointed in the manner provided above for the appointment of Special Counsel.

board of directors of International Controls or (ii) in breach of duties owed to defendant International Controls or its subsidiaries by present or former officers, directors or employees of International Controls or any other person. The Special Counsel shall consult with plaintiff Commission and the board of directors of International Controls in the resolution of all claims International Controls may have. He shall neither decline to pursue any claim . . . nor settle any claims, against the recommendation of plaintiff Commission and without the approval of this Court.[3]

After an investigation of over four years' duration, Special Counsel Butowsky filed a 785-page Report with the Court on November 29, 1977. The Report concluded that ICC had possible claims against various parties, including Hogan & Hartson, requested that Special Counsel be permitted to initiate litigation as appropriate and proper in pursuit of those claims, and that Special Counsel be authorized to utilize the

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3 Special Counsel's additional responsibilities under the consent decree were as follows:

(c) in the event that International Controls does not file with plaintiff Commission any necessary filings as ordered herein, the Special Counsel shall make such reports and filings for International Controls and take such other actions as may be required within such time as plaintiff Commission shall designate;

(d) pending the investigation and accounting by the Special Counsel, he shall take immediate necessary or appropriate action to protect International Controls' claims, interests and rights and pursue all possible claims against the defendants herein or any other persons including, but not limited to, the commencement of legal proceedings to prevent the dissipation or flight of any funds or other assets, the placing of a stop transfer order on securities beneficially owned or controlled by said defendants and/or the institution of appropriate action to freeze and preserve the assets of said defendants or others who may be obligated to International Controls; and

(e) take such further action, subject to the approval of this Court, as may be necessary or appropriate for the protection of the shareholders of International Controls.

firm of Gordon Hurwitz in conducting such litigation. Thereafter, on November 29 and 30, 1977, Butowsky instituted three suits on behalf of ICC against the law firm of Hogan & Hartson and Thorpe, a partner in that firm, including the instant action in which, pursuant to an order of Judge Stewart dated November 28, 1977,[4] ICC is represented by Special Counsel's law firm, Gordon Hurwitz.

DEFENDANTS' CONTENTIONS

Hogan & Hartson and Thorpe contend that certain conflicts of interest, both real and apparent, preclude Butowsky and his firm from representing ICC in this litigation. Specifically, defendants claim that disqualification of plaintiff's attorneys is necessary because of conflicts between Special Counsel's alleged duties and responsibilities to the Court, the SEC, and others and his firm's role as litigation counsel to ICC in this action. Defendants also assert that, as a court-appointed fiduciary akin to a receiver, Special Counsel may not employ the services of his own law firm. Finally, defendants take the position that disqualification of Butowsky and his firm is required because of a substantial relationship between both Butowsky's duties as court-appointed Special Counsel and the instant litigation and Butowsky's partner Theodore Altman's former responsibilities as an Assistant Director of the Division

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4 By order dated November 28, 1977, Judge Stewart authorized the filing of the complaint in this action "in substantially the form annexed as Exhibit A to the David M. Butowsky Affidavit." The attached complaint makes several references to the fact that Gordon Hurwitz would be acting as plaintiff's counsel, including the specific statement that: "This action is brought by Special Counsel, David M. Butowsky by his attorneys Messrs. Gordon Hurwitz Butowsky Baker Weitzen & Shalov on behalf of ICC against Messrs. Hogan & Hartson and Merle Thorpe, Jr." Thus, at least implicitly, Judge Stewart approved Special Counsel's use of Gordon Hurwitz as litigation counsel in this action. That Special Counsel subsequently applied to use the services of the firm of Shea Gould Clemenko & Casey in conducting the litigation against Hogan & Hartson does not negate this approval, particularly since it appears that no action was taken on said application.

of Enforcement of the SEC and the subject matter of this action. Hogan & Hartson and Thorpe contend that these acts and practices violate both the Code of Professional Responsibility and the applicable legal precedents.

STANDARDS FOR DISQUALIFICATION

The standards for determining whether a motion for disqualification of counsel should be granted were recently addressed by the Second Circuit in *Board of Education v. Nyquist,* 590 F.2d 1241 (2d Cir. 1979). There, balancing the benefits of immediate disqualification against the harm to both litigants and public confidence in the judicial process which results from the removal of counsel chosen by a client and the often tactical delay in the proceedings, the Court indicated that disqualification is generally appropriate only when necessary to preserve the integrity of the adversary process in the very action before the Court. *Id.* at 1246. Specifically, the Court held that allegations of attorney misconduct should normally be referred to the federal or state attorney disciplinary machinery rather than be addressed in the very litigation in which they arise unless the attorney's conduct tends to "taint the underlying trial" in one of the following two ways: "(1) where an attorney's conflict of interests in violation of Canons 5 and 9 of the Code of Professional Responsibility undermines the court's confidence in the vigor of the attorney's representation of his client, . . . or . . . (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation, for example, in violation of Canons 4 and 9, thus giving his present client an unfair advantage." *Id.* (footnotes and citations omitted). Since an appearance of impropriety is most unlikely to affect the outcome of a case, the Court indicated that it alone is "simply too slender a reed on which to rest a disqualification order except in the rarest cases." *Id.* at 1247; *id.* (Mansfield, J., concurring).

DISCUSSION

In the instant case, defendants have not alleged that, by virtue of prior representation or otherwise, Butowsky has acquired any privileged information with regard to them, which gives ICC an unfair advantage in this litigation. They do claim that as Special Counsel Butowsky has had obligations to the Court, the SEC, and others which conflict with his duty of undivided loyalty to ICC under Canon 5. However, the Court doubts that these allegations are such as the *Nyquist* Court intended be addressed in the very litigation in which they surface rather than through the conventional attorney disciplinary machinery. The cases cited in *Nyquist* as examples of instances where the failure to provide a vehicle for immediate disqualification would "taint the underlying trial" all involved circumstances in which, absent contemporaneous disqualification of opposing counsel, prejudice could result to the movant within that very proceeding. *See Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225 (2d Cir. 1977); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976); *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973). Implicit in the Court's discussion is the notion that absent a threat of such prejudice, the needs of efficient judicial administration require that the disciplinary authorities, not the Court, serve as the forum for raising charges of attorney impropriety.

Here, defendants claim that by virtue of his loyalties to the Court, the SEC, and others, Butowsky's representation of ICC in the instant case will result in prejudice and a violation of his duty of undivided loyalty not to themselves, but to ICC. ICC, however, does not share defendants' concern for its welfare. Acting through its new shareholder-elected Board of Directors, it has passed a resolution strongly opposing the disqualification of Gordon Hurwitz as its litigation counsel in this action. Under these circumstances, this Court believes that the violations of Canon 5 charged by defendants do not "taint" these proceedings within the meaning of *Nyquist* and that, therefore, the alleged improprieties should be raised

before the bar disciplinary authorities and not before this Court.

Even assuming, however, that defendants' allegations of a breach of loyalty by ICC's attorneys are such as would warrant consideration in the instant litigation, defendants have failed to raise any issue which the Court believes constitutes a violation of Canon 5 or which "undermines [its] confidence" in the vigor of Gordon Hurwitz's representation of ICC in this action. Canon 5 dictates that neither an attorney's personal interests, nor the interests of other clients or third parties be permitted to dilute the attorney's loyalty to his client. Defendants do not contend that the interests of any other of Butowsky's or his firm's clients are implicated by his representation of ICC in this case. The only alleged personal interest of Butowsky cited by defendants that could possibly affect his judgment in this case is a purported interest in upholding in this litigation the findings of the Report he submitted to the Court in his role as Special Counsel. Even if he has such a potential interest, however, the Court sees nothing in the record which would lead it to conclude that there is a "reasonable probability" that such interest will, in contravention of EC 5-2, affect adversely the advice to be given or the services to be rendered ICC in this litigation. The Court notes further in this regard that, assuming Butowsky has such a potentially adverse personal interest, his continued representation of ICC in this action is still permissible under DR 5-101(A) because ICC has consented to the representation with full knowledge of Butowsky's role as Special Counsel. Finally, Gordon Hurwitz's continued representation of ICC is permissible under EC 5-21, despite any influence third parties might exert on Butowsky, since Butowsky has made full disclosure of defendants' charges to ICC, and his firm's continuation in this litigation comes after both ICC's and Gordon Hurwitz's determination that any such influence will not impair the effectiveness of the representation of ICC in this case.

Furthermore, upon examination of the conflicting interests of third parties alleged by defendants, the Court finds nothing which "undermines [its] confidence" in the vigor of Gordon Hurwitz's representation of ICC in this action. The Court agrees with defendants that as Special Counsel Butowsky has had certain loyalties and owed certain obligations to the Court and to the SEC. However, defendants have pointed to nothing about those obligations which convinces the Court that Butowsky and his firm are unable properly to serve ICC's interests as its litigation counsel in this case. Indeed, the Court, the SEC, and ICC's independent Board of Directors all share an interest in the effective prosecution by ICC of any claims it may have as a result of the Vesco affair and have each independently indicated approval of the appointment of Gordon Hurwitz to prosecute the instant litigation against Hogan & Hartson and Thorpe.

Defendants have also asserted that Butowsky owes certain responsibilities and loyalties to other third parties with claims against ICC. Specifically, they point out that Butowsky's duties as Special Counsel included investigating and reporting to the Court and the SEC on the existence of unasserted claims against ICC and that as Special Counsel Butowsky believed he had a duty to protect a settlement with various IOS-related entities against possible adverse action by ICC. Assuming *arguendo* that these aspects of Special Counsel's responsibilities can be said to involve duties to third parties, it would appear that those duties have already been fully performed, since Special Counsel filed his Report almost two years ago, and the IOS settlement referred to has been consummated. In addition, defendants have failed to explain how the aforementioned responsibilities relate to the subject matter of this lawsuit or how they affect the ability of Gordon Hurwitz to represent ICC's interests herein. In sum, defendants have not persuaded the Court that Butowsky has duties or loyalties to others which will interfere with the vigor of his firm's representation of ICC in this case.

Hogan & Hartson and Thorpe also argue that Gordon Hurwitz must be disqualified from representing ICC in these proceedings because Butowsky's role as Special Counsel is akin to that of a receiver and receivers are universally prohibited from hiring their own law firms. They essentially base this argument on *In re Ira Haupt & Co.*, 361 F.2d 164 (2d Cir. 1966).[5] There, while allowing a bankruptcy trustee to continue to retain his own law firm as counsel for the bankrupt firm, Judge Friendly stated for the Court:

> [W]e do not think the retainer of a trustee's own firm is a practice to be encouraged in substantial estates. . . . "Such appointments should be the exception and made only when sound special circumstances justify." . . . The reasons are plain enough. The conduct of bankruptcy proceedings not only should be right but must seem right.

361 F.2d at 168, *quoting In re Street Rys. Advertising Co.*, 54 F.Supp. 577, 578 (S.D.N.Y. 1941). Judge Friendly explained that there must always be doubt if the trustee can make a truly disinterested determination whether his own firm is best qualified to serve as his counsel under the circumstances of a particular case. In addition, the creditors whose interests the trustee must protect might doubt, as was the situation in *Ira Haupt*, whether the trustee could make a completely objective determination as to the quality of the representation being put forward by his own law firm. The Court also noted the advisability of obtaining the views of an independent general counsel in a complicated bankruptcy matter. *Id.* at 168-69.

The considerations addressed by the Court in *Ira Haupt* are not without a certain pertinence to the present case. However, in contrast to the situation there, any doubts as to whether

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5 Defendants have cited additional cases to support the proposition that court-appointed fiduciaries may not use the services of their own firms. However, those cases are not analogous to the situation presently before the Court, since they did not involve a trustee's use of his own law firm to provide legal services to the estate. In this regard, *see* Rules 215(e) & (f), 219(d), Fed. R. Bankruptcy.

Butowsky can objectively judge his firm's ability to conduct this litigation are assuaged by the approval of the firm's designation, not only by the Court, but also by the SEC. Moreover, because ICC has approved Gordon Hurwitz's continued participation here, this case does not present the problem confronted in *Ira Haupt* in which the persons for whose benefit the litigation was being conducted doubted whether the trustee could be completely objective as to the proficiency of the performance of his own law firm.

Furthermore, the Court's views in *Ira Haupt* as to the inadvisability of a trustee's retaining his own law firm were based on the importance of a lawyer's avoiding even the appearance of impropriety. However, in balancing the harm to the judicial process which can result from disqualification motions against the benefits to be gained thereby, this Circuit concluded in *Nyquist* that, except in the rarest cases, an appearance of impropriety will not by itself warrant the drastic and immediate action of disqualification of counsel chosen by a party. 590 F.2d at 1246-47; *id.* at 1247-48 (Mansfield, J., concurring). Because even the appearance of impropriety is relieved in the present case by the approval by the Court, the SEC, and ICC of Gordon Hurwitz's participation in this case, this Court holds that *Ira Haupt* does not mandate disqualification of plaintiff's attorneys.

Defendants also assert that the decision of this Circuit in *General Motors Corp. v. City of New York*, 501 F.2d 639 (2d Cir. 1974), requires Gordon Hurwitz's removal from its position as plaintiff's counsel in this case. There the Court disqualified an attorney from representing New York City in a private antitrust damage action against General Motors based on essentially the same claims of monopolization of the market for city buses as had been involved in a Government investigation and lawsuit on which the lawyer had worked as an attorney for the Antitrust Division of the Justice Department. The Court's decision was premised in part on the importance of avoiding even the appearance of impropriety which can result when a former Government lawyer's action as

a public legal official might be affected by the hope of later being employed privately to uphold or upset what he or she had done. 501 F.2d at 648-49, 650 n.20. However, as Judge Mansfield noted in his concurring opinion in *Nyquist,* the decision in *General Motors* was also influenced by the specific applicability of DR 9-101(B), which dictates that "[a] lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee," and by the concern implicit in that disciplinary rule that the attorney could obtain an unfair advantage for his client, thereby prejudicing his adversary's case if not immediately disqualified, by using information with regard to the matter in issue which was gained in confidence as a public employee and was unavailable to the other side. 590 F.2d at 1247-48 n.1 (Mansfield, J., concurring).

By contrast to *General Motors,* the instant case does not directly implicate DR 9-101(B) because, while arguably a fiduciary of the Court akin to a receiver, Butowsky's position as Special Counsel has not been that of a public employee.[6] Defendants have, however, made some reference to the fact that, as Special Counsel, Butowsky had access to SEC private investigatory files containing relevant information which the SEC will not provide to them. If this assertion were proved true, the Court would be disposed to grant defendants' motion, because it would result in the kind of immediate prejudice or unfair advantage to a party which the Court believes "taint[s] the underlying trial," 590 F.2d at 1246, *quoting W.T. Grant & Co. v. Haines,* 531 F.2d 671, 678 (2d Cir. 1976), within the meaning of *Nyquist. Cf. United States v. Ostrer,* 597 F.2d 337 (2d Cir. 1979). However, at this point

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6 One important distinction between Butowsky's position as Special Counsel and that of an attorney who is a public employee is that ICC, not the public, has paid for the services rendered by Butowsky as Special Counsel. Thus, this case does not involve the appearance of impropriety which results when a litigant has been unduly favored by the use of valuable information gathered by its attorney while on the Government payroll. *United States v. Ostrer,* 597 F.2d 337, 340 (2d Cir. 1979).

defendants have not persuaded the Court that there exists relevant information in the SEC private investigatory files which has been provided to Special Counsel, but not to them. It is undisputed that the SEC has provided defendants' attorneys access to certain transcripts from its private investigatory files. Plaintiff maintains that these transcripts are the only material from the SEC private files viewed by Special Counsel. While defendants assume, based on certain statements made by Butowsky and one of his partners in other contexts,[7] that Special Counsel has seen additional material which the SEC will not provide to them, there is nothing in the record which suggests that defendants' attorneys have even asked the appropriate authorities at the SEC, either informally or via the discovery process, whether Special Counsel was shown any additional material and, if so, whether they too may examine it.[8] Inasmuch as the SEC has obviously cooperated with defendants' counsel to the extent of permitting them to review transcripts from its private investigatory files, the Court cannot assume that the SEC will not provide defendants with any further relevant material

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7 Defendants rely on a statement at page 6 of Special Counsel's Report indicating that he had access to the "files of the SEC investigation including numerous transcripts of testimony [which] were made available and fully reviewed," and on a letter dated October 23, 1975 from Theodore Altman to the Secretary of the SEC pursuant to Rule 6 of the Commission's Conduct Regulation, 17 C.F.R. § 200.735-8, which states that "[Special Counsel Butowsky] has been granted access to the Commission's entire investigative file."

8 Defendants have served plaintiff with interrogatories and a related document request regarding the identity of the material from the SEC private investigatory files made available to Special Counsel. However, plaintiff has objected to these discovery requests, claiming that the SEC provided the material to Butowsky on the condition that he maintain its confidentiality. Pending is a motion by defendants pursuant to Rule 37(a), Fed. R. Civ. P., to compel discovery. Even assuming, however, that defendants do not prevail on this motion, the Court would not be prepared to conclude that disqualification of plaintiff's counsel is appropriate under *General Motors* or *Nyquist* due to prejudice to defendants in these proceedings absent an indication that the SEC itself had refused to provide defendants' attorneys with relevant information seen by Special Counsel.

examined by Special Counsel.[9] Accordingly, while it would be willing to reconsider the matter upon an appropriate showing by defendants, the Court believes that on the present record disqualification is not required under *General Motors* by virtue of Butowsky's position as Special Counsel.

Defendants make a further related argument that disqualification is required under *General Motors* and DR 9-101(B) because Butowsky's partner Theodore Altman ("Altman") had substantial responsibility for investigation of the "EHG transaction" involved in this lawsuit while he was an Assistant Director of the Division of Enforcement of the SEC. Although the EHG transaction is not mentioned by name in the complaint, defendants contend that it forms a part of ICC's charges here because of a general reference in paragraph 56 of the complaint to "other transactions of similar import or purpose" which plaintiff has identified in its answers to defendants' interrogatories as transactions described on certain pages of Special Counsel's Report, including pages which describe the EHG transaction. Plaintiff's counsel assert by affidavit, however, that no part of the EHG transaction is involved in plaintiff's case. At this stage of the proceedings, the Court is not in a position to determine the extent to which the EHG transaction will be relied on by plaintiff in this lawsuit or whether Altman's involvement therein was such as would bring into play the dictates of DR 9-101(B). Therefore,

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9 The SEC has indicated in its amicus brief that it may, in its discretion, make any document in its possession available to any requester, even under the Freedom of Information Act, 5 U.S.C. § 522 *et seq.*, unless such disclosure would reveal trade secrets. Accordingly, there appears to be no official regulation which would foreclose the SEC's providing defendants with any relevant material viewed by Special Counsel. The Court also notes that because of the SEC's wide latitude in disclosing its private investigatory files to outsiders, it would appear that the SEC could provide whatever material it gave to Special Counsel to any replacement counsel to ICC. Nevertheless, the Court is inclined toward the view that a showing that Butowsky, by virtue of his position as Special Counsel, received relevant material from the SEC private investigatory files which the SEC refused to provide to defendants would warrant disqualification of Gordon Hurwitz in this case.

it cannot at this time grant a motion to disqualify plaintiff's attorneys on this basis. Furthermore, even if it should later develop that the disciplinary rule is applicable, it appears to the Court that a remedy short of disqualification of Gordon Hurwitz from this entire action might well be devised, for example, by severing any claim of plaintiff's in which facts relating to the EHG transaction are in controversy.

The Court recognizes that a certain appearance of impropriety may surround this case. Even absent an actual breach of his duty of undivided loyalty to ICC, the various roles Butowsky has played with regard to Vesco matters may trouble the outside lay observer. Likewise, some residual question may remain as to Butowsky's ability to judge the effectiveness of his own firm's representation of ICC, despite approval by the Court, the SEC, and ICC. Lastly, although the other factors present in *General Motors* are not applicable in this case, it may still appear that, in his investigative and reporting functions as Special Counsel, Butowsky could have been influenced by a self-interest in later being retained by ICC to prosecute this lawsuit.

In view of these possible appearances, the Court believes it would have been preferable for another law firm to represent ICC in this case.[10] Nevertheless, it does not believe that the above possibilities suffice to make this litigation one of those rare cases in which the appearance of impropriety alone justifies an order of disqualification. The purpose of Canon 9 is to avoid the erosion of public confidence in the judicial system and the legal profession which can result when conduct

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10 According to the affidavit of Butowsky, he attempted at various times during the investigation to find appropriate counsel to take on the litigation which might result therefrom, because he believed that his own firm might not have the available personnel to serve as litigation counsel. He states that "[d]uring the course of these efforts, I interviewed or contacted representatives of approximately ten law firms. Of these, only one expressed any interest in further discussion toward assuming responsibilities for the litigation, and that firm did not, in my view, have sufficient available resources."

that is in fact ethical may appear to laymen to be unethical. *Woods v. Covington County Bank,* 537 F.2d 804, 813 (5th Cir. 1976); *General Motors Corp. v. City of New York,* 501 F.2d 639, 649 (2d Cir. 1974). However, as the Second Circuit recognized in *Nyquist, see* 590 F.2d at 1246-47; *id.* at 1247-48 (Mansfield, J., concurring), disqualification of counsel may defeat other important societal interests, such as the client's right to counsel of his or her choice, a lawyer's right to freely practice the profession, and the government or court's need to attract skilled lawyers to difficult positions. *Woods v. Covington County Bank, supra,* 537 F.2d at 812; *Society for Good Will to Retarded Children, Inc. v. Carey,* 466 F.Supp. 722, 725 (E.D.N.Y. 1979); *see Emle Industries, Inc. v. Patentex, Inc.,* 478 F.2d 562, 564-65 (2d Cir. 1973). In view of these other interests and the proliferation of disqualification motions interposed for purely strategic purposes, *International Electronics Corp. v. Flanzer,* 527 F.2d 1288, 1289 (2d Cir. 1975); *J.P. Foley & Co., Inc. v. Vanderbilt,* 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring), an overly broad application of Canon 9 is likely to result in greater public suspicion of the bar and the judiciary than would the appearance of impropriety itself. *Woods v. Covington County Bank, supra,* 537 F.2d at 813; *see Board of Education v. Nyquist, supra,* 590 F.2d at 1247; *id.* at 1247-48 (Mansfield, J., concurring).

In the present case, the parties have fought as if in a major war over a motion to disqualify plaintiff's counsel made by defendants on grounds which focus primarily on the interests of ICC, which secondarily involve the public interest, and which only incidentally refer to possible prejudice to defendants themselves. Even assuming that defendants in fact have acted with the purest of motives, the appearance is that they have been engaged in a strategic ploy which has already succeeded in stalemating this litigation for months and which will in all probability continue to do so as the result of an appeal. In this Court's view, a greater loss of public confidence in the judicial system and the legal profession

would result from granting a motion for disqualification under these circumstances than from allowing Gordon Hurwitz to continue representation of ICC in this action.

Accordingly, for the foregoing reasons, defendants' motion is denied.

It is so ordered.

Dated: New York, New York
August 21, 1979

ROBERT J. WARD
U.S.D.J.

No. 80-577

IN THE

Supreme Court of the United States

October Term, 1980

HOGAN & HARTSON and MERLE THORPE, JR.,

Petitioners,

against

INTERNATIONAL CONTROLS CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Should this Court grant certiorari to review the appealability of an order denying a motion to disqualify respondent's counsel where (i) the District Court found no factual or legal support for the asserted substantive issue underlying the motion and further found no "taint" to the proceedings, and, accordingly, no substantive basis for disqualification under the applicable law of the Second Circuit and (ii) the procedural issue of appealability has already been briefed and is about to be reviewed by this Court.

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No. 80-577

IN THE

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HOGAN & HARTSON and MERLE THORPE, JR.,

Petitioners,

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INTERNATIONAL CONTROLS CORP.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent International Controls Corp. respectfully submits this brief in opposition to the petition of Hogan & Hartson and Merle Thorpe, Jr. for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Statement of the Case

Petitioners Hogan & Hartson, a Washington, D.C. law firm, and Thorpe, a partner of Hogan & Hartson, previously represented respondent and Robert Vesco during the time respondent was controlled and directed by Vesco. In addition, Thorpe was a director of respondent during that period. This suit, commenced in November 1977, alleges that petitioners aided and abetted Vesco's violations of the federal securities laws and committed legal malpractice, breach of fiduciary duty and other wrongdoings, causing substantial damage to respondent.

As a result of an enforcement action, brought by the Securities and Exchange Commission, naming Vesco, respondent and numerous others as defendants, *SEC* v. *Vesco,* 72 Civ. 5001 (S.D.N.Y.), respondent consented to a final judgment enjoining it from violating various provisions of the securities laws (215a).* The consent judgment also provided for appointment of a "Special Counsel" for respondent and other relief.

Under the terms of the consent judgment, Special Counsel was authorized and directed, *inter alia,* to

> (a) conduct a full investigation . . . into the financial and other affairs of International Controls, and report to this Court and plaintiff Commission his findings and recommendations for action [and] . . .

* Consistent with the petition in this case, references to the appendices to the petition are designated "App. ——," and references to the joint appendix filed in the Second Circuit Court of Appeals and submitted with the petition, are designated "——a."

> (b) *take all appropriate action, including* but not limited to, *the institution and prosecution of suits on behalf of International Controls* . . . .

(218a) (emphasis added).

Shortly thereafter, David Butowsky was appointed Special Counsel for ICC (65a) and embarked on his investigation, which resulted in a detailed report setting forth Special Counsel's findings and recommendations, including a recommendation that the instant action be brought against petitioners.

On or about November 23, 1977, Butowsky applied to the District Court for an order authorizing the filing of the complaint (225-58a). The application was duly granted by the District Court by order dated November 28, 1977 (225a), and on November 29, 1977, the complaint was filed (2a).

In June 1978, petitioners filed their second motion to disqualify Butowsky's law firm, Gordon Hurwitz Butowsky Baker Weitzen & Shalov, from continuing to act as respondent's litigation counsel (110a).* It is that motion which resulted in the order of which review is now sought in this Court.

The District Court denied the motion and held that petitioners "have failed to raise any issue which the Court believes constitutes a violation of Canon 5 [of the Code of Professional Responsibility] or which 'undermines [its] confidence' in the vigor of Gordon Hurwitz's representation of ICC in this action." (App. 8). In addition, the District

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* In March 1978, petitioners also had moved to disqualify Special Counsel and his firm (37a). Following a conference at which the District Court expressed its intention to deny the motion (112a), it was withdrawn by petitioners (109a).

Court found that there was no "taint" of the proceedings, and petitioners did not even assert any prejudice to them by virtue of the Gordon Hurwitz firm's representation of respondent (App. 7). *See Board of Education of New York City* v. *Nyquist,* 590 F.2d 1241 (2d Cir. 1979).

The District Court's closing comments on petitioners' motion are of particular importance in this Court's consideration of whether to grant a writ of certiorari in this case:

> In the present case, the parties have fought as if in a major war over a motion to disqualify plaintiff's counsel made by defendants on grounds which focus primarily on the interests of ICC, which secondarily involve the public interest, and which only incidentally refer to possible prejudice to defendants themselves. *Even assuming that defendants in fact have acted with the purest of motives, the appearance is that they have been engaged in a strategic ploy which has already succeeded in stalemating this litigation for months and which will in all probability continue to do so as the result of an appeal.* In this Court's view, a greater loss of public confidence in the judicial system and the legal profession would result from granting a motion for disqualification under these circumstances than from allowing Gordon Hurwitz to continue representation of ICC in this action.

App. 16-17 (emphasis added).

After petitioners' appeal from the District Court order was briefed and argued in the Second Circuit, the Court of Appeals rendered its en banc decision in *Armstrong* v. *McAlpin,* 625 F.2d 433 (2d Cir.), *petition for cert. filed,* 49 U.S.L.W. 3190 (U.S. Sept. 30, 1980) (No. 80-431). There-

after, the Court of Appeals dismissed the appeal in this action. As we argue below, *see* pp. 7-8, *infra,* in view of the Second Circuit's consideration on the merits of those appeals from denials of disqualification motions that were pending in the Court of Appeals at the time of the en banc opinion in *Armstrong,* the dismissal of the appeal in this case should be viewed as a determination on the merits of petitioners' claim.

Reasons for Denying the Writ

1. Petitioners seek this Court's review of the order of the Second Circuit Court of Appeals for the sole reason that a conflict exists among the circuits regarding whether or not orders denying motions to disqualify counsel are appealable under 28 U.S.C. § 1291. Petitioners make no effort, and indeed would be hard pressed, to argue that the underlying issue of disqualification has sufficient importance to warrant this Court's attention.

While a conflict among the circuits or between a decision of a court of appeals and this Court are necessary conditions for the exercise by this Court of its review powers, such a conflict, standing alone, is seldom a sufficient basis for the grant of a writ of certiorari. This Court has frequently denied review despite an asserted conflict among the circuits, *e.g., Maryland* v. *Marzullo,* 435 U.S. 1011 (1978); *Dupuy* v. *Dupuy,* 434 U.S. 911 (1977), or between a court of appeals and this Court, *e.g., Cleveland Board of Education* v. *Reed,* 445 U.S. 935 (1980).

Among the reasons for its denying review, this Court will not generally undertake a review which might "risk

inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute,'' *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955), as, for example, when a case turns on its facts. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). Moreover, even where there is an asserted conflict among the circuits, the case must present ''an issue of immediate public significance.'' *Rice* v. *Sioux City Memorial Park Cemetery, Inc., supra*, 349 U.S. at 78-79 & n.2. *See also Lakeside Bridge & Steel Co.* v. *Mountain State Construction Co.*, 445 U.S. 907, 910-11 (1980) (White, J., dissenting from denial of certiorari).

In this case, a review by this Court would clearly not involve any issue of ''immediate public significance.'' The disqualification issue which petitioners raised in the courts below presented virtually no issues of significance, as is evident from the opinion of the District Court. Petitioners could present no coherent theory, let alone any set of facts, to indicate that they or any other party or third persons had been prejudiced by any conduct of the Special Counsel or his attorneys nor did they indicate any way in which the trial of this matter might be tainted by Special Counsel's retention of his law firm to prosecute this massive securities fraud action. Significantly, the District Court clearly and pointedly indicated that petitioners' motion had the appearance of ''a strategic ploy which has already succeeded in stalemating this litigation for months . . . .'' (App. 16).

Finally, petitioners argue that the issue of appealability, to which they have artfully limited their petition, has importance. However, this Court has already agreed to re-

view the issue of appealability sought to be presented in this case by granting the petition for a writ of certiorari in *Firestone Tire & Rubber Co.* v. *Risjord,* 48 U.S.L.W. 3733 (U.S. May 12, 1980) (No. 79-1420), and that case will soon be argued to this Court. 49 U.S.L.W. 3304 (U.S. Oct. 28, 1980). By reason of the grant of the petition in *Firestone,* this Court has assured that the public interest in having this procedural issue resolved, *cf., United States* v. *W.T. Grant Co.,* 345 U.S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 309-10 (1897), as well as the paramount interest in the uniformity of interpretation under 28 U.S.C. § 1291 will be served, and a uniform rule, establishing the proper procedure in all of the federal courts, will be promulgated.

In sum, far from bringing a matter of public importance before this Court, the petition in this case, if it has any interest at all, is important only to the petitioners as "a stragetic ploy" for delaying or impeding prosecution of serious allegations of wrongdoing.

2. In *Armstrong* v. *McAlpin, supra,* 625 F.2d 433, the Second Circuit announced that it was overruling its prior holdings on the appealability issue and would henceforth treat denials of motions seeking to disqualify counsel as non-appealable collateral orders. 625 F.2d at 437-41. *See Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541 (1949). The Second Circuit nevertheless reached the merits of the disqualification issue—and affirmed the District Court—because, among other reasons, "it would be an enormous waste of judicial resources simply to dismiss the appeal . . . ." 625 F.2d at 442. Similarly, in *Cheng* v. *GAF Corp.,* Dkt. No. 80-7254, slip op. 5195 (2d Cir. Aug. 26, 1980), the Second Circuit, although reiterating that denials of mo-

tions to disqualify counsel are not appealable, nevertheless reached the merits—and reversed the District Court. As the court stated:

> Since this appeal was filed, briefed, argued, and considered prior to the filing of the *Armstrong* decision, our disposition of the appeal on the merits will neither crowd the appellate docket nor delay the litigation below. On the other hand, for us to dismiss the appeal at this stage would entail a needless waste of both judicial and private resources. Cheng's appeal was filed in full compliance and proper reliance on the pre-*Armstrong* law of this Circuit. The evils the *Armstrong* decision is intended to avoid have already occurred in the instant case and cannot be undone by dismissal at this stage of the proceedings. Consequently, we can see no justification for wasting the time and resources of the parties, the trial court and this Court by requiring Cheng to re-appeal at a later date. Nor do we view *Armstrong* as intending such a result.

Cheng v. *GAF Corp., supra,* slip op. at 5199 n.2. *See also In re Multi-Piece Rim Products Liability Litigation,* 612 F.2d 377, 379 (8th Cir.) (en banc), *cert. granted sub nom. Firestone Tire & Rubber Co.* v. *Risjord,* 48 U.S.L.W. 3733 (U.S. May 12, 1980); *Melamed* v. *ITT Continental Baking Co.,* 592 F.2d 290, 295 (6th Cir. 1979).

Here, as in *Cheng* and *Armstrong,* the appeal by petitioners was filed, briefed and argued prior to the en banc decision in *Armstrong.** Given the Second Circuit's consideration of the merits in these pre-*Armstrong* appeals, it is apparent that the Second Circuit in this case did not see any merit in petitioners' appeal. Accordingly, any

* Indeed, this case was argued prior to the Second Circuit's determination to rehear *Armstrong* en banc.

ruling by this Court which would have the effect of remanding the case for appellate consideration of the disqualification issue would be wasteful of judicial resources.

Conclusion

The petition for a writ of certiorari should be denied in all respects.

Dated: November 7, 1980

Respectfully submitted,

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